

This letter discusses the interstate commerce exemption as applied to the sale of coal within this State to an out-of-State purchaser. See 86 Ill. Adm. Code 130.605(c). (This is a PLR.)

August 25, 2005

Dear Xxxxx:

This letter is in response to your letter dated January 14, 2005, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to TAXPAYER for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither TAXPAYER nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

TAXPAYER is hereby submitting this request for a Private Letter Ruling. This letter is submitted pursuant to Illinois Regulation, 2 Ill. Adm. Code 1200.110, and includes the following information required pursuant to Section 1200.110, subsections (b)(1) through (b)(7).

I. Administrative Matters

1. This requests concerns the application of the interstate commerce exemption ('ICE') authorized under Section 2-60 of the Retailers' Occupation Tax Act (35 ILCS 120/2-60)¹ and Section 3-45 of the Service

¹ No tax is imposed under this Act upon the privilege of engaging in a business in interstate commerce or otherwise, when the business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State. (As amended by P.A.'s 86-444 and 86-953, Laws 1989; P.A. 86-1475, Laws 1990; as reenacted by P.A. 91-51 (S.B. 144), Laws 1999, effective June 30, 1999).

Occupation Tax Act (35 ILCS (115/3-45))². TAXPAYER is requesting this ruling to confirm its understanding that coal purchased from a coal mine in Illinois that is shipped via common carrier rail for ultimate consumption by TAXPAYER in STATE is exempt from sales tax in accordance with the decision by the Illinois Supreme Court in *Union Electric Company v. Department of Revenue*; *Georgia Power Company v. Arch of Illinois, Inc.* (Roger D. Sweet, Director of Revenue, et al.), 136 Ill2d 385, 556 NE2d 236 (1990).

2. TAXPAYER's ruling request is for tax periods after January 31, 2005. TAXPAYER does not have an audit or litigation pending with the Illinois Department of Revenue ('Department').
3. Please note the attachment to this letter includes a confidential summary diagram outlining the mechanics of the contract flows based in the facts outlined below.
4. To the best TAXPAYER's knowledge, the Department has not previously ruled on the same or similar issue for TAXPAYER or a predecessor, nor has the same or similar issue been submitted to the Department but later withdrawn before a letter ruling was issued.
5. TAXPAYER identifies all facts related to the contract terms with ABC and the amount of coal to be purchased from XYZ as trade secret information to be deleted from the publicly disseminated version of the private letter ruling. Furthermore, because this transaction involves a publicly traded company (TAXPAYER) and is a material transaction, any disclosure of information related to this transaction or the parties to this transaction prior to the proper Securities and Exchange Commission filings could be deemed a violation of federal and state securities laws.

II. Statement of Authority

There are no direct cases or Illinois Private Letter Rulings addressing the specific facts described herein. Where pertinent to the issue discussed, we have referenced the existing authorities and rulings.

For simplicity and clarity, the *Issue Presented* for the Department's consideration and ruling are set forth following the Statement of Facts.

III. Statement of Facts

TAXPAYER is a corporation that owns several different sources throughout the United States. The relevant TAXPAYER facility for this Ruling Request is a coal powered electric generating plant located in CITY/STATE Plant. The CITY/STATE Plant is needed to power an adjacent manufacturing plant owned and operated by TAXPAYER in CITY/STATE. Finally, XYZ is a corporation in the business of securing fuel sources

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for TAXPAYER and affiliates' power and manufacturing plants throughout the United States.

XYZ has been in negotiations with an independent third-party, ABC Company ('ABC'), to secure long-term coal supply for the CITY/STATE Plant. These negotiations have led to the following critical facts for which TAXPAYER requests a ruling on the applicability of ICE to the sales transaction between TAXPAYER and XYZ:

1. XYZ will purchase the coal mining lease rights currently owned by ABC for the CITY2.
2. XYZ will also purchase all the current mining equipment and mine assets located at CITY2 from ABC.
3. XYZ will enter into a long-term mining services agreement with ABC to mine CITY2 for XYZ pursuant to an agreed upon mine plan.
4. XYZ will contract with a third-party common carrier rail company known as BUSINESS to build a rail spur to CITY2 from their current main line nearby and then to transport the coal from CITY2 to the CITY/STATE Plant owned by TAXPAYER.
5. XYZ will enter into a sales contract with XYZ for the sale of the CITY2 coal to TAXPAYER for TAXPAYER's consumption at the CITY/STATE Plant in STATE.
6. XYZ will contract with the common carrier and ABC to arrange for day-to-day loading and shipping of all coal from CITY2 to TAXPAYER via the common carrier rail line.
7. Title for the coal will transfer from XYZ to TAXPAYER f.o.b. CITY/STATE Plant. At no time will TAXPAYER take physical possession of the coal in Illinois.

IV. Issue Presented / Ruling Requested

Please confirm our understanding that coal purchased from a mine in Illinois that is shipped via common carrier rail for ultimate consumption by TAXPAYER in STATE is exempt from Illinois Retailers Occupation Tax.

V. Applicable Law

Citations for and pertinent text of certain authorities are provided as needed herein.

VI. Taxpayer Analysis

XYZ sells the coal mined in Illinois by ABC to TAXPAYER for consumption in STATE in TAXPAYER's CITY/STATE Plant. Even though ABC will extract and process the coal in Illinois for XYZ, the coal is shipped via common carrier outside of Illinois to consummate the sale. XYZ uses a common carrier to ship the coal from Illinois to STATE for the final consumption by TAXPAYER. TAXPAYER does not have any representative in Illinois to take possession or control of the coal. Instead, XYZ and ABC will work together to have the coal mined, processed, and shipped via common carrier to STATE f.o.b. CITY/STATE Plant.

TAXPAYER's understanding is supported by the following authorities:

Under Illinois' Retailers' Occupation Tax Act, there is a specific exemption from the tax for sales that are deemed to be part of interstate commerce. See, 35 ILCS 120/2-60. Furthermore, the regulations interpreting the Retailers' Occupation Tax Act provide that:

- b) The tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in this State to a point outside this State, not to be returned to a point within this State, provided that the delivery is actually made.
- c) Nor does the tax apply to gross receipts from sales in which the seller, by carrier (when the carrier is not also the purchaser) or by mail, under the terms of his agreement with the purchaser, delivers the goods from a point in this State to a point outside this State not to be returned to a point within this State. The fact that the purchaser actually arranges for the common carrier or pays the carrier that effects delivery does not destroy the exemption. However, *it is critical that the seller is shown as the consignor or shipper on the bill of lading. If the purchaser is shown as either the consignor or the shipper, the exemption will not apply.*

See, 86 Ill Adm. Code 130.605(b) & (c) (Emphasis added). Here, TAXPAYER will be the purchaser located in STATE and XYZ will be the seller in Illinois that will be the consignor/shipper on the bill of lading of all of the coal shipped from STATE to TAXPAYER in Illinois [sic]³. Furthermore, under the terms of the contract between XYZ and TAXPAYER, XYZ has contracted with a common carrier, BUSINESS, to make the physical delivery of the coal from Illinois to STATE and the coal is not to be returned to the CITY2 mine in Illinois.

Furthermore, in *Union Electric Company v. Department of Revenue; Georgia Power Company v. Arch of Illinois, Inc. (Roger D. Sweet, Director of Revenue, et al.)* (Illinois Supreme Court, Nos. 68406, and 68527, May 30, 1990, 136 Ill2d 385, 556 NE2d 236), the Court addressed an analogous fact pattern to that in this request. In a consolidated action, the Illinois Supreme Court affirmed that a Missouri and Georgia power company were not liable for Illinois sales or use tax on coal purchased from Illinois mines for use in out-of-state power plants.

The Missouri power company arranged for the coal to be transported by a railroad operated by a common carrier to Cora Dock Corporation (Cora Dock), an Illinois dock facility on the Mississippi River, where the coal was loaded onto barges operated by a common carrier for shipment to the power plant located in Missouri. The Georgia power company arranged for the Illinois mining company to load the coal onto rail cars leased by the mining company from a third party for shipment to a coal loading facility in Illinois on the Mississippi River, where the coal was loaded onto barges owned and operated by Central Barge Lines, Inc. (Central Barge), a common carrier, for shipment to a transloading facility in Alabama. From Alabama, the coal was transported to power plants located in Georgia. Id.

³ Taxpayer acknowledges this misstatement and has submitted additional documentation to clarify that all coal will be shipped from Illinois to STATE, not to be returned to the State of Illinois.

The Court in *Union Electric* relied on PLR 81-0264, March 5, 1981, which addresses the shipment of coal in interstate commerce and provides, in relevant:

[A seller is] considered to be making an *exempt interstate commerce* shipment to the purchaser where [the seller] deliver[s] the goods at a point in Illinois to an independent common or contract carrier for delivery at a point outside Illinois to the purchaser if [the seller] pay[s] the carrier for its transportation charge (even if [the seller is] later reimbursed by the purchaser), or if [the seller is] shown on the waybill or bill of lading as the shipper. [A seller is] considered to be the shipper to the out-of-State destination, with the purchaser first receiving the physical possession of the property outside Illinois, if [the seller is] shown as the consignor or shipper on the bill of lading even if the purchaser contracted with the carrier for the transportation service and pays the carrier directly. The purchaser is deemed to be receiving the physical possession of the property in Illinois even when the property is transported out of Illinois by a carrier to the purchaser in another state if the purchaser hires and pays the carrier direct *and* is shown on the shipping document as the consignor or shipper as well as being the consignee.

Id. (emphasis added). Although PLR's are not deemed to be precedential by the Court in *Union Electric*, they can contain a general policy that is applicable to the Department and must be adopted by statute. Id. Consequently, based on the *Union Electric* case and the abovementioned parameters for coal shipments/sales to be taxable within Illinois, it is TAXPAYER's belief that its purchases of coal from XYZ should be exempt from sales tax under the ICE outlined above.

Request for Ruling

We respectfully request a ruling as suggested and set forth in the Issue Presented / Ruling Requested section of this Private Letter Ruling.

Thank you very much for your timely consideration of this Private Letter Ruling Request. Please feel free to call me if you have any questions.

In your letter of July 26, 2005, you state as follows:

Pursuant to your discussion yesterday, this letter shall serve as confirmation that TAXPAYER and COMPANY are separate and distinct legal entities with separate business purposes within the TAXPAYER global business structure. The following summarizes the organization and purpose of each company and the details regarding the proposed transaction between TAXPAYER and XYZ for which TAXPAYER requests a ruling on the applicability of the Interstate Commerce Exemption ('ICE'):

TAXPAYER was incorporated in STATE on March 31, 1900 and is a wholly owned subsidiary of TAXPAYER. It is a power generating corporation that owns several different power generating sources throughout the United States. The power generated

from this company is supplied to TAXPAYER locations in STATES. TAXPAYER is regulated by the Federal Energy Regulatory Commission ('FERC').

XYZ is a separately organized STATE corporation. It is in the business of securing fuel sources for TAXPAYER and their affiliates' power and manufacturing plants throughout the United States. XYZ is not a FERC regulated legal entity like TAXPAYER. In addition to the relevant coal for the Ruling Request in Illinois, XYZ owns coal reserves in STATE2 and STATE which it is either planning to contract to third parties or is currently contracted with third parties.

XYZ finalized the contract between an independent third-party, ABC, to secure long-term coal supply for TAXPAYER's CITY/STATE Plant this year. The following are critical facts of the transaction that TAXPAYER has previously requested a ruling on the applicability of ICE:

1. XYZ purchased the coal mining lease rights that use to be owned by ABC for the CITY2.
2. XYZ also purchased all the current mining equipment and mine assets located at CITY2 from ABC.
3. XYZ will contract with a third-party common carrier rail company, BUSINESS, to build a rail spur to CITY2 from their current main line nearby and then to transport the coal from CITY2 to the CITY/STATE Plant owned by TAXPAYER.
4. TAXPAYER will enter into a sales contract with XYZ for the purchase of the CITY2 coal for TAXPAYER's consumption at the CITY/STATE Plant in STATE.
5. XYZ will contract with the common carrier and ABC to arrange for day-to-day loading and shipping of all coal from CITY2 to TAXPAYER via the common carrier rail line.
6. Title for the coal will transfer from XYZ to TAXPAYER f.o.b. CITY/STATE Plant. At no time will TAXPAYER take physical possession or title of the coal in Illinois.

If you have any further questions regarding the above or the Private Letter Ruling Request submitted in January, please feel free to call me.

DEPARTMENT'S RESPONSE:

Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. When tangible personal property is located in this State at the time of its sale (or is subsequently produced in this State) and then is delivered in this State to the purchaser or his agent, the gross receipts from the sale are subject to tax if the sale is at retail.

Transactions as described in 86 Ill. Adm. Code 130.605(b) and 130.605(c) are not subject to tax. The tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in this State to a point outside this State, not to be returned to a point within this State, provided that delivery is actually made. See 86 Ill. Adm. Code 130.605(b).

Nor does the tax apply to gross receipts from sales in which the seller, by carrier (when the carrier is not also the purchaser) or by mail, under the terms of his agreement with the purchaser, delivers the goods from a point in this State to a point outside this State not to be returned to a point within this State. The fact that the purchaser actually arranges for the common carrier or pays the

carrier that effects delivery does not destroy the exemption. However, it is critical that the seller is shown as the consignor or shipper on the bill of lading. If the purchaser is shown as either the consignor or the shipper, the exemption will not apply. See 86 Ill. Adm. Code 130.605(c).

In Union Electric Company v. Department of Revenue; Georgia Power Company v. Arch of Illinois, Inc., 136 Ill.2d 385, (1990), the Supreme Court of Illinois, in part relying on the Department's policy stated in a letter ruling that the purchaser not be shown as the consignor or shipper, affirmed that neither the purchaser nor its agent were the shippers of the coal transported out-of-State. The Court determined that this standard as applied by the Department upheld that the interstate commerce exemption should apply.

Based on the documents and representations you have submitted for the transaction described in your letter-request, the purchaser, TAXPAYER does not incur Use Tax on the purchase of the coal from the seller, XYZ, under the provisions of 86 Ill. Adm. Code 130.605(c). This decision is based upon your representations that: 1) purchaser and seller are separate and distinct legal entities; 2) seller is shown as the consignor or shipper on the bill of lading for all transportation of the coal from a point within this State to a point outside of this State; and 3) the coal will not be returned to this State.

The factual representations upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter ruling, you may contact me at 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Edwin E. Boggess
Associate Counsel

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